IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1174

FEDERATION OF TELEPHONE WORKERS
OF PENNSYLVANIA, *Petitioner*

v.

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA, *Respondent*

THE BELL TELEPHONE COMPANY
OF PENNSYLVANIA, *Respondent*

v.

FEDERATION OF TELEPHONE WORKERS
OF PENNSYLVANIA, *Petitioner*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REASONS FOR DENYING WRIT OF CERTIORARI

The Decision of the Court of Appeals Does Not Present Any Conflict With the Principles Laid Down by this Court in the Steelworkers Trilogy.

The decision sought to be appealed is a Judgment Order of the Court of Appeals for the Third Circuit affirming the judgment of the district court setting aside and denying enforcement of six items of a labor arbitration award (A15), "for the reasons set forth in the district court opinion by The Honorable A. Leon Higginbotham, Jr., 406 F.Supp. 1201 (E.D.Pa. 1975)" (A1).[1]

Judge Higginbotham's Memorandum Opinion and Order is set forth as Appendix C to the Petition for Certiorari. The district court Opinion sets forth the applicable law as follows (A7-A8):

> "It is well settled that the arbitration of labor disputes is a federally favored policy. 29 U.S.C. § 173(d); *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, 377, 94 S.Ct. 629, 636, 38 L.Ed.2d 583 (1974); *Controlled Sanitation Corp. v. District 128, International Association of Machinists*, 525 F.2d 1324, at 1328 (3d Cir. 1975). The threshold question of arbitrability, however, is a matter for judicial determination. *International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491, 92 S.Ct. 1710, 1713, 32 L.Ed. 2d 248 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 913, 11 L.Ed.2d 898 (1964); *Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 241, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); see *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409

1. References to A1, etc., refer to pages of the Appendices contained in the Petition for Certiorari

(1960).[8] Since arbitration is a matter of contract, 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *Warrior and Gulf, supra,* 363 U.S. at 582, 80 S.Ct. at 1353; see *John Wiley & Sons, Inc., supra,* 376 U.S. 547, 84 S.Ct. 909. Thus, an employer and a union can agree to exclude certain issues or disputes from the arbitration procedures of their collective bargaining agreement. *Atkinson, supra,* 370 U.S. at 241-42, 82 S.Ct. 1318; *Warrior and Gulf, supra* at 584-85. If there is doubt about whether the parties have agreed to submit a dispute to arbitration, those doubts should be resolved in favor of arbitration. *Warrior and Gulf, supra,* 363 U.S. at 583, 80 S.Ct. 1347. If, however, 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,' id. at 582-83, 80 S.Ct. at 1353, and if the collective bargaining agreement contains an 'express provision excluding a particular grievance from arbitration,' id. at 485, 80 S.Ct. at 1354, then the particular dispute or grievance is non-arbitrable. Should enforcement be sought for an arbitrator's award based upon a non-arbitrable provision of a collective bargaining agreement, enforcement must be denied. See *Enterprise Wheel and Car Corp., supra,* 363 U.S. at 597, 80 S.Ct. 1358.

"8. The Steelworkers Trilogy, of which the Warrior and Gulf case is part, is the most authoritative Supreme Court statement of the national policy favoring arbitration of labor disputes. See also *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) and *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960)."

Applying these well-established principles to the instant case, the district court concluded that the arbitrator exceeded his authority by basing certain items of his award on Article 22 of the parties' labor agreement which Article contained an express exclusion from arbitration of ". . . any dispute between the Union and the Company involving the terms of this Article . . ." (A15, 32).

Petitioner (hereinafter "Union") claims that the decision below conflicts with the principles laid down by this court in the Steelworkers Trilogy cases.[2] The Union reiterates the judicial policy of deference to arbitration and reluctance of the courts to become involved with questions of contract interpretation and objects to the fact that the district court in reaching its conclusion that the arbitrator exceeded his authority, interpreted and applied the exclusionary clause of the labor agreement. It fails, however, to point out that the reluctance to interpret the labor contract is with regard to questions going to the merits of a dispute and not with regard to the extent of the promise to arbitrate. It ignores two major principles of the Trilogy decisions. One, is that an arbitrator's authority may not contravene or extend beyond that conveyed in the labor agreement. The second is that the question of whether the arbitrator has exceeded his authority under the labor agreement is to be determined by the court. This Court stated in *Warrior, supra,* 363 U.S. at 582:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required

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2. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. . . ."

And in the *Enterprise* case, 363 U.S. at 597:

". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) this Court upheld the lower courts' refusals to stay an employer's damage suit against a union. It rejected the union contention that the company was bound to arbitrate its claim under the applicable labor agreement. This Court stated at 241:

". . . Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is *a matter to be determined by the Court on the basis of the contract entered into by the parties*. . . ." (Emphasis added)

In the *Atkinson* case, this Court interpreted the provisions of the labor agreement in issue and concluded at 370 U.S. 241-242:

"While it is quite obvious from other provisions of the contract that the parties did not intend to commit all of their possible disputes and the whole scope of their relationship to the grievance and arbitration procedures established in Article XXVI, that article itself is determinative of the issue in this case since it precludes arbitration boards from considering any matters other than employee grievances. . . ."

Following the lead of this Court in the Steelworkers Trilogy and the *Atkinson* case, the federal courts have consistently applied the principle that an arbitrator's authority is limited to that conveyed by the labor agreement and have necessarily interpreted labor agreements in doing so. The Third Circuit in *Affiliated Food Distributors, Inc. v. Teamsters Local 229*, 483 F.2d 418, 420 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) made it clear that:

"The principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties. When a contract, fairly read with these principles in mind, is susceptible of a construction that dictates arbitration, the congressional policy favoring that form of dispute resolution may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent. But, there is no occasion to resort to this congressional policy in a case where the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the court. We conclude that this is such a case." (Footnotes omitted)

See, *Local 13, International Federation of Professional and Technical Engineers v. General Electric Company*, 531 F.2d

1178 (3d Cir. 1976); *Monongahela Power Co. v. Local* 2332, *IBEW and Local* 2357, No. 75-1329 (4th Cir. filed Feb. 9, 1976), 78 LC ¶11,281; *Communications Workers of America v. New York Telephone Co.*, 327 F.2d 94 (2d Cir. 1964);[3] *Sperry Rand v. Engineers Union*, 371 F. Supp. 198 (S.D. N.Y. 1974).

It is submitted that the Trilogy principles require the court to review the labor agreement to determine if the parties "did agree to give the arbitrator power to make the award he made."[4] That is exactly what the district court did in this case and the district court's reasoning and conclusion that the agreement could not reasonably be read to give the arbitrator power to make the award which was made was affirmed by the Third Circuit.

B. Petitioner's Claim that the Decision Is in Conflict With Other Prior Decisions of the Third Circuit Does Not Advance a Reason for Granting Certiorari and Is, in Fact, Baseless.

The Union's claim that the decision in this case conflicts with prior Third Circuit decisions does not advance any ground to grant certiorari under the criteria set forth in Rule 19 of the rules of this Court. Conflicting decisions within the circuit are properly resolved by the Court of Appeals and need not be resolved by this Court.

Moreover, the decision in this case is in full accord with prior Third Circuit decisions applying the Trilogy principles. See *Local 13, International Federation of Professional and Technical Engineers v. General Electric*

3. In the *Communications Workers* case the issue, arguments and the labor agreement were in all significant respects similar to those in the instant case. This case is discussed in the district court Opinion at 406 F. Supp. 1204-1205 (A8-10).

4. *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 at 582.

Company, 531 F.2d 1178 (3d Cir. 1976); *Affiliated Food Distributors, Inc. v. Teamsters Local* 229, 483 F.2d 418 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

The only case cited by the Union in support of its claim of conflict within the Third Circuit is *Local 103, International Union of Electrical, Radio and Machine Workers v. RCA Corporation*, 516 F.2d 1336 (3d Cir. 1975) (Petition 17). In *RCA*, the union after demanding and commencing arbitration proceedings withdrew from the arbitration and brought an action to enjoin further arbitration proceedings upon the ground that a prior arbitration decision was determinative of the grievance in issue. The union relied on a contract provision which provided that "In no event . . . shall the same question [or issue] be the subject of arbitration more than once." 516 F.2d at 1338. The *RCA* court noted that the subject matter of the dispute was covered by the arbitration provisions of the agreement and that there is little doubt that if it had been the first dispute involving job classification it would have been arbitrable. 516 F.2d at 1340. The court held that the effect of the prior arbitration award in light of the agreement's arbitration clause was for the arbitrator to decide. It, therefore, affirmed the district court's refusal to enjoin the pending arbitration proceedings.

It is submitted that the facts of the *RCA* case plainly distinguish it from the instant case. Unlike the case at bar, or the *General Electric* case,[5] the *RCA* case did not involve an express exclusionary clause which removed disputes over specific subjects from the arbitrator's jurisdiction. Nor did it involve a situation in which ". . . the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute

5. In the *General Electric* case, the Third Circuit held that the agreement's management rights article which expressly excluded "assignment of work" from arbitration precluded the union from enjoining a transfer of work operations and from requiring arbitration of its grievance over the transfer. *Local 13, International Federation of Professional and Technical Engineers v. General Electric Company*, 531 F.2d 1178 (3d Cir. 1976).

before the court." *Affiliated Food Distributors, Inc. v. Teamsters Local 229*, 483 F.2d. 418 (3d Cir. 1973) at 420.

C. Contrary to the Union's Petition, the Decision in this Case Is Not in Conflict with Decisions of Other Courts of Appeals.

The Union discusses only one case in support of its claim that the decision below conflicts with decisions of other courts of appeals, *Bressette v. International Talc Co., Inc.*, 527 F.2d 211 (2d Cir. 1975). (Petition 20)[6] The *Bressette* case is plainly distinguishable from the instant case.[7] *Bressette* involved a company claim that the termination of its business terminated all obligations under its labor agreement including its obligation to arbitrate. The union claimed that the successorship clause and various other provisions of the labor agreement were violated by the company. The court stated at 527 F.2d 215:

> ". . . What the Company is really contending is not that the agreement has expired, but that the agreement, properly interpreted, imposes no obligations on the Company once it has unilaterally determined that it will terminate operations. This is not an issue of whether there is a contract, but of what the contract requires, and is for the arbitrator."

The Second Circuit, thus, found in *Bressette* that the main dispute involved the substantive effect of contract provisions and was not one of arbitrability.

Although not indicated in the Union's Petition, there was one issue in *Bressette*, concerning pension rights, which involved a question of arbitrability. On this issue the court found that, "At the very least, there is a significant question as to whether the parties meant to exclude disputes over this subsection from arbitration under the provisions of the collective bargaining agreement." 527 F.2d at 216. The court, therefore, also referred the pension dispute, including the question of arbitrability, to the arbitrator.

In the instant case the award of the arbitrator, based on the Promotion article of the labor agreement was before the court. The clear words of Section 22.04 of that article left no "significant question" and no doubt that disputes involving that article are excluded from arbitration. (A32)[8]

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6. After discussing *Bressette*, the Petition recites some general principles emphasizing the narrow scope of court review in labor arbitration, without mentioning the principles that an arbitrator's authority is confined to that provided in the labor agreement and that the question of whether an arbitrator has exceeded such authority is for the Court to decide. Following its incomplete statement of the standards for review of labor arbitration, the Petition at page 21 lists a number of cases. None of these cases involve express exclusions from arbitration, nor do they in any manner support the Union's claim of a conflict between the Third Circuit and other circuits. Toward the bottom of page 21, the Petition cites two other cases for the proposition that "The courts have been unanimous in deferring to interpretations rendered by arbitrators even where they involve the meaning of exclusionary clauses." The cases cited are *International Union of Electrical, Radio and Machine Workers v. Peerless Pressed Metal Corp.*, 489 F.2d 768 (1st Cir. 1973) and *Safeway Stores v. American Bakery and Confectionary Workers International Union*, 390 F.2d 79 (5th Cir. 1968). The cases do not involve exclusionary clauses nor do they in any manner support the proposition advanced, much less the alleged unanimity of the courts on such proposition.

7. The Union's statement of the facts and issue in the *Bressette* case refutes its conclusion that "The holding in Bressette is squarely in conflict with the decision of the Court of Appeals in the instant case." (Petition 20). That the Second Circuit is in accord with the decision below is illustrated by its decision in *Communications Workers of America v. New York Telephone Co.*, 327 F.2d 94 (2d Cir. 1964) which the district court below pointed out is "remarkably similar to the instant case." (A9).

8. "Article 22
Promotions
* * *
"22.04 It is understood that any dispute between the Union and the Company involving the terms of this Article may be grieved but shall not be subject to arbitration." (A31-32)

It is submitted that the Union's claim of a conflict between the Third Circuit and other circuit courts of appeals based solely on the *Bressette* case, is totally baseless.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Union's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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